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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CAROLYN CLARK, et al.,

Plaintiff,

v.

INCOMM FINANCIAL SERVICES, INC.,

Defendant.

Case No.: 5:22-CV-01839-JGB-SHK

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT INCOMM FINANCIAL SERVICES, INC.'S MOTION TO DISMISS

Hon. Jesus G. Bernal

Date: Mar. 6, 2023
Time: 9:00 A.M.
Courtroom: 1

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PRELIMINARY STATEMENT

In their opposition to InComm's motion to dismiss, Plaintiffs backtrack on many of their Complaint's core allegations. Although the Complaint repeatedly accuses InComm of "affirmatively misrepresent[ing]" its Vanilla Gift Cards, Compl. ¶¶ 58, 92, Plaintiffs now disclaim any suggestion that InComm "made any affirmative misrepresentations." Opp'n at 7, ECF No. 36. Though the Complaint alleges that InComm "deliberately conceal[ed] material facts" while "intend[ing] to" induce consumers to buy the cards, Plaintiffs now concede that InComm did not have "any intent to induce reliance or defraud consumers" after all. Compl. ¶¶ 42–43; Opp'n at 7. And while Plaintiffs' Complaint is premised on the charges allegedly "made against [Plaintiffs' cards] by Unauthorized Users," Plaintiffs admit that all payment products present some risk of unauthorized use, and they never expected "the cards to be fraud-proof." Compl. ¶ 12; Opp'n at 9.

Aside from these explicit concessions, Plaintiffs make several implicit ones, too. They have seemingly abandoned their allegation that InComm "intentionally erect[ed] barriers" to effective customer service. Compl. ¶¶ 64, 72. And they do not defend the sufficiency of their allegations that their cards' balances were depleted by unauthorized users. *See* Opp'n at 10.

There was not much to Plaintiffs' Complaint before all this backtracking, and now almost nothing remains. Plaintiffs continue to maintain that InComm "omitted" that "its substandard security practices left the Cards vulnerable to fraudulent use." *Id.* at 13. But they do not explain, in either the Complaint or opposition, what the "standard" for security was or how InComm failed to meet it. They also do not say where or when InComm "omitted" this information, or why InComm had a duty to disclose it. All Plaintiffs have offered is their bare speculation that some unspecified characteristic of InComm's security falls short of some unspecified industry standard; that InComm "omitted" this failing from some unspecified communication; and that, if not for this omission, Plaintiffs

would somehow be better off. That is not enough to state a claim under the UCL or CLRA. For these reasons, among others that Plaintiffs fail to rebut in their opposition, the Court should dismiss the Complaint with prejudice.

ARGUMENT

I. Rule 9(b) Applies to All of Plaintiffs' Claims

Plaintiffs treat their failure to plead the elements of fraud as a feature rather than a bug of the Complaint, arguing that this deficiency excuses them from the particularity requirement of Rule 9(b). They emphasize that they have not alleged certain "required element[s] of fraud," such as "inten[t] to deceive or induce reliance." *Id.* at 6. To the contrary, they argue, their Complaint alleges that InComm routinely "informs . . . consumers" about the possibility of unauthorized card depletion, "suggesting [InComm] is ***not*** engaged in an overall scheme to defraud Card purchasers and recipients." *Id.* at 8 (emphasis added).

On that much, Plaintiffs are correct: they have not sufficiently alleged any intentional deception or "scheme to defraud." They have, by their own description, fallen short of the pleading requirements of Rule 9(b). But Plaintiffs cannot escape those requirements just by admitting their failure to satisfy them. "[N]ominal efforts" to disclaim a theory of fraud are "unconvincing where the gravamen of the complaint is plainly fraud." *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1405 n.2 (9th Cir. 1996); *see also Katz v. China Century Dragon Media, Inc.*, 2011 WL 6047093, at *3 (C.D. Cal. Nov. 30, 2011) ("A complaint's disclaimer that its claims do not sound in fraud does not affect the requirement to plead in accordance with Rule 9(b) if the claims in fact sound in fraud.").

As set forth in InComm's opening brief, Plaintiffs' claims indeed sound in fraud, and are thus subject to the pleading standards of Rule 9(b). *See* Mot. to Dismiss at 10–23, ECF No. 23 ("Mot."). In their opposition, Plaintiffs allow that ***one*** of their claims—unjust enrichment—sounds in fraud. Opp'n at 6–9. But that claim relies on the same factual allegations as all the others. S*ee* Compl. ¶¶ 36, 89,

91–92. Accordingly, by conceding that their unjust enrichment claim sounds in fraud, Plaintiffs have effectively admitted that the rest of the Complaint does, too. *See Rubke v. Capitol Bancorp, Ltd.*, 551 F.3d 1156, 1161 (9th Cir. 2009) ("Where . . . a complaint employs the exact same factual allegations to allege [one cause of action] as it uses to allege fraudulent conduct under [another], we can assume that it sounds in fraud.").

Plaintiffs cannot escape this principle with the assertion that merely negligent omissions may suffice to violate the UCL and CLRA. *See* Opp'n at 8–9 (discussing *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097 (9th Cir. 2003)). First, the case that Plaintiffs cite for that proposition pre-dates the Ninth Circuit's holding in *Kearns* that "nondisclosure is a claim . . . in a cause of action for fraud," and therefore "must be pleaded with particularity under Rule 9(b)." *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1127 (9th Cir. 2009).[1] Indeed, the *Marolda* and *Mui Ho* cases (on which Plaintiffs rely) reaffirm that after *Kearns*, a "plaintiff must now plead nondisclosure with particularity." *Marolda v. Symantec Corp.*, 672 F. Supp. 2d 992, 997 n.2 (N.D. Cal. 2009); *Mui Ho v. Toyota Motor Corp.*, 931 F. Supp. 2d 987, 991 (N.D. Cal. 2013) (applying Rule 9(b) to nondisclosure claims). Second, even assuming some statutory claims can be premised on mere negligence, Plaintiffs' claims here are not. The Complaint accuses InComm of "knowing and willful" deception, *e.g.*, Compl. ¶ 56, of "***deliberately*** concealing material facts," *id.* ¶ 43 (emphasis added), and of doing so with the "inten[t]" to induce "the sale of goods," *id.* ¶ 42 (emphasis added). These are classic allegations of fraud, not "negligence."

In short, notwithstanding Plaintiffs' revisionist account, their Complaint sounds in fraud, and is subject to Rule 9(b). Plaintiffs' failure to plead the elements of fraud does not entitle them to relaxation of those standards. It compels dismissal

[1] Because this is a categorical statement of law, Plaintiffs' lengthy attempt to distinguish *Kearns* on its facts is of no consequence. *See* Opp'n at 7–8.

of their Complaint. And in any event, Plaintiffs' Complaint would also fail under Rule 8, given the absence of sufficient "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

II. Plaintiffs Have Not Stated a CLRA or UCL "Unlawful" Claim

Plaintiffs' UCL "unlawful prong" claims and CLRA claims are all premised on InComm's alleged violations of Civil Code Sections 1770(a)(5) and 1770(a)(7). These provisions forbid merchants from "[r]epresenting" that goods (i) have "characteristics, uses, benefits, or quantities that they do not have," or (ii) are of a "standard, quality, or grade" that they are not. *See* Compl. ¶ 42; Opp'n at 13.

Although the Complaint accuses InComm of having "affirmatively misrepresented" its cards through "direct and indirect representations," Compl. ¶¶ 58, 92, Plaintiffs now back away from these allegations, and explain that their CLRA-based claims are premised on InComm's misleading "omissions." Opp'n at 7, 9. For an omission to be actionable under the CLRA (or UCL), it "must be contrary to a representation actually made by the defendant, or an omission of a fact the defendant was obliged to disclose," *Hodsdon v. Mars, Inc.*, 891 F.3d 857, 861 (9th Cir. 2018) (cleaned up), and the plaintiff must have relied on the omission to their detriment, *Daniel v. Ford Motor Co.*, 806 F.3d 1217, 1225 (9th Cir. 2015).

Plaintiffs must also plead the circumstances of the alleged omission, with particularity. *See* Mot. at 15–16. And they "must set forth an explanation as to *why* the . . . omission complained of was false or misleading." *Cooper v. Pickett*, 137 F.3d 616, 625 (9th Cir. 1997) (emphasis added). Plaintiffs' Complaint fails on every one of these criteria, and each failure is an independent reason to dismiss the Complaint.

A. Plaintiffs have not adequately alleged a factual omission.

The foundational defect of Plaintiffs' Complaint is its failure to identify, with particularity, the information that InComm is accused of "omitting." On the first

page of their opposition, Plaintiffs contend that InComm "omitted two material facts: (1) The Cards may have less purchasing power than their Face Value; and (2) [InComm's] security measures may allow Unauthorized Users to access" and spend the card balances. Opp'n at 1. But as Plaintiffs admit, they never expected InComm's cards to be "fraud-proof." *Id.* at 9. No reasonable consumer would, given that all prepaid products are at some risk of unauthorized use. Thus, by Plaintiffs' own telling, the fact that unauthorized access "may" occur is common knowledge.

Later in their opposition, Plaintiffs zero in on the idea that InComm "knowingly failed to inform consumers that its Cards were vulnerable to unauthorized use ***due to sub-standard security measures***." *Id.* at 6–7 (emphasis added). In other words, they accuse InComm of "omitting" the fact that an unspecified security deficiency left the cards uniquely vulnerable to fraud. But their Complaint contains no facts suggesting that such a deficiency existed, or explaining what it was. All Plaintiffs have alleged is the "sheer possibility" that their own gift cards were depleted by unauthorized users. *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted); Mot. at 5–7, 13–14. And Plaintiffs' opposition does not elaborate on the facts underlying their suspicions of unauthorized use, though those suspicions form the sole basis of their "omissions"-based claim.

In any event, even assuming that Plaintiffs' cards indeed fell prey to "unauthorized use," that does not establish that InComm's security measures were "substandard." As Plaintiffs concede, episodes of unauthorized use can occur with any kind of gift card, and are not a reflection of InComm's security measures. Any given cardholder's risk of unauthorized use may be increased by, *e.g.*, the sudden emergence of a new hacking technique, or by the cardholder's failure to safeguard her PIN, among many other possibilities. Indeed, given the regular occurrence of electronic security breaches and the diversity of factors that contribute to them, courts have consistently declined to treat such breaches, standing alone, as

indicative of substandard security. *See Griffey v. Magellan Health Inc.*, 562 F. Supp. 3d 34, 50 (D. Ariz. 2021); *Feins v. Goldwater Bank NA*, 2022 WL 17552440, at *7 (D. Ariz. Dec. 9, 2022).

For these reasons, reports of unauthorized use cannot support Plaintiffs' claim that InComm "omitted" information about "substandard" security practices. Instead, Plaintiffs' allegations must identify the "standards" for security in similar products, the ways in which InComm's fell short, and the security-related information that it should have provided. Notably, the complaint in the *Mui Ho* decision, on which Plaintiffs rely, included information of this sort. *See Mui Ho*, 931 F. Supp. 2d at 991. That complaint alleged that the defendants' headlamps were "prone to condensation and moisture retention," which caused them "to become dangerously dim or to fail completely." *Id.* Here, by contrast, Plaintiffs offer no more than vague references to InComm's "inadequate security measures," Compl. ¶ 45, and "sub-standard security practices and procedures," *id.* ¶ 52. Plaintiffs have failed to make clear what information they are accusing InComm of "omitting."

B. Plaintiffs' excuses are insufficient to justify these failings.

Plaintiffs acknowledge their failure to allege facts supporting their claim of InComm's "substandard" security practices. But they ask to be excused from doing so, on the basis that they do not actually know anything about InComm's security practices. As they explain, "only [InComm] has access to details about its security practices." Opp'n at 11–12 (citing *Park v. Thompson*, 851 F.3d 910, 928 (9th Cir. 2017)).[2] Therefore, according to Plaintiffs, they cannot be expected to identify

[2] Plaintiffs also say that InComm has exclusive access to "purchase activity on its Cards," Opp'n at 12, but that is wrong, as their own Complaint shows. There, they allege that InComm's website provides cardholders with information about "specific charges" against a gift card's balance. Compl. ¶ 4.

InComm's security flaw until they have had the chance to root around in discovery and find it.

Plaintiffs have it backwards. It is their burden, in the first instance, to set forth sufficient "factual context" to make their account of InComm's conduct plausible. *Park*, 851 F.3d at 928. Here, the Complaint does not offer a single fact that is indicative of deficient security practices at InComm. Even the most "relaxed" pleading standard requires more than rank speculation. In any event, Plaintiffs' professed ignorance of InComm's security practices does not square with their allegations about their own reliance on InComm's alleged omissions. Plaintiffs say they "assume[d]" that InComm "would use industry-standard measures" when they purchased the cards. Opp'n at 7. If that is true, then they should at least be able to say what measures they had in mind.

In short, although Plaintiffs premise their claim on InComm's supposed "omission" of information, they have not said what information InComm omitted. This dooms their UCL "unlawful" and CLRA claims.

C. Plaintiffs fail to allege the circumstances of the alleged omissions.

In another fatal defect, the Complaint offers no information about the circumstances of the purported omission—including "how, where, and when" InComm was supposed to disclose whatever it is accused of omitting. *See* Mot. at 15–17. A case cited by Plaintiffs, *Brown v. Starbucks Corp.*, 2019 WL 4183936 (S.D. Cal. Sept. 3, 2019), highlights this failure. Opp'n at 20. In *Brown*, the plaintiff clearly alleged "what" Starbucks intentionally failed to disclose (the presence of artificial flavors in violation of California law), and "how" that misled her—by omitting a specific piece of information (that gummies contained artificial flavors) from a specific place (the package). *See id.* at *4.

Here, by contrast, Plaintiffs provide no information about the setting of InComm's purportedly unlawful "omission." As discussed above, they do not say "what" the omission was or "how" it misled them. But they also fail to say "where"

it occurred. That is, from what communication(s) did InComm supposedly "omit" the information—and what reason is there to believe that, if it had not been omitted, Plaintiffs would have seen it and acted differently? Plaintiffs clarify in their opposition that they have no quarrel with InComm's "advertisements or marketing," so none of those materials was the scene of the offending omission. Opp'n at 9. Though the product label is another possibility, neither Plaintiffs' Complaint nor their opposition hints at product labeling as the offender, either. Accordingly, Plaintiffs have left InComm in the dark not only about what information it supposedly omitted, but where and when it did so.

D. Plaintiffs have not adequately alleged InComm's duty to disclose.

The pleading deficiencies discussed above doom Plaintiffs' claims several times over, but those claims also fail for an additional reason: Even if InComm failed to reveal some deficiency in its security measures, Plaintiffs have not shown that InComm had a ***duty to disclose*** that deficiency to begin with. A defendant has a duty to disclose only those defects that (1) create unreasonable "safety hazards" or (2) are central to the product's functionality. *Hammerling v. Google LLC*, 2022 WL 2812188, at *7–9 (N.D. Cal. July 18, 2022).

Here, Plaintiffs have not attempted to allege a safety hazard, and cannot plausibly allege an impediment to their cards' central function. As Plaintiffs acknowledge, that central function is to permit the user to make purchases against the card balance. *See* Opp'n at 9. Plaintiffs do not allege that their cards failed to perform this function, but rather that the wrong people (*i.e.*, unauthorized users) reaped its benefits. At least one court has dismissed omission-based CLRA and UCL claims under analogous circumstances. *See Barrett v. Apple Inc.*, 2022 WL 2119131, at *11 (N.D. Cal. June 13, 2022). The allegations in *Barrett* related to Apple's purported failure to alert gift card purchasers about the risk that third-party "gift card scam[mers]" would appropriate and use their funds. *Id.* The court found that Apple had no duty to disclose this risk, because the fact that the "scammers"

ultimately redeemed the cards showed that the "central function of the gift card—to serve as a form of payment . . . —was not, in fact, at all impeded." *Id.* Therefore, the risk could not have impeded the products' "central function."

The same is true here. Even laying aside Plaintiffs' failure to allege that InComm withheld information about its purported security defects, Plaintiffs' claims would still fail, because Plaintiffs' own allegations show that the cards' "central function" of funding purchases was unimpaired. Accordingly, Plaintiffs do not and cannot allege that InComm had a duty to disclose the information in question (whatever it was).[3]

* * *

According to Plaintiffs' opposition, their claims target InComm's "omission" of information about the cards' substandard security. Yet their Complaint contains no facts about how InComm's security was substandard; what the "standard" was; what facts InComm omitted; when or where it did so; or the basis of its duty to disclose those facts. Each of these is a separate and independent basis for dismissing their CLRA claims and UCL claims under the "unlawful" prong.

III. Plaintiffs' UCL "Unfair Business Practices" Claims Fail

Plaintiffs' UCL "unfair" claims are based on the same set of allegations as all of their other statutory claims: InComm's alleged omission of its "failure to implement . . . security measures." Opp'n at 16. But the "unfair" prong of the UCL is not a fallback option for complaints that fail under the statute's "unlawful"

[3] Furthermore, even if the cards had a security defect, InComm would have had to know "of the defect at the time of sale" in order to have a duty to disclose it. *Williams v. Yamaha Motor Co. Ltd.*, 851 F.3d 1015, 1025 (9th Cir. 2017). On that point, too, Plaintiffs have made no non-conclusory allegations. This is another ground for dismissing their Complaint. *See, e.g.*, *Antonyan v. Ford Motor Co.*, 2022 WL 1299964, at *5 (C.D. Cal. Mar. 30, 2022) (dismissing UCL claims for failure to allege knowledge of undisclosed defect at time of sale).

prong. Accordingly, courts routinely dismiss UCL "unfair" claims that, like this one, "overlap[] entirely" with the conduct alleged in failed claims under other prongs of the statute. *See Eidmann v. Walgreen Co.*, 522 F. Supp. 3d 634, 647 (N.D. Cal. 2021); *accord Hammerling*, 2022 WL 2812188, at *15; *Saavedra v. Everi Payments, Inc.*, 2022 WL 17886025, at *5 (C.D. Cal. Apr. 11, 2022); *Knuttel v. Omaze, Inc.*, 2022 WL 1843138, at *13 (C.D. Cal. Feb. 22, 2022). This Court should do the same.

In any event, Plaintiffs' UCL "unfair" claim is a nonstarter, and none of the data-breach cases cited by Plaintiffs suggests otherwise. *See* Opp'n at 16–17. In those cases, the plaintiffs alleged specific facts about the ways in which defendants' security practices fell short of industry standards or the defendants' own policies. *See Svenson v. Google Inc.*, 2015 WL 1503429, at *1 (N.D. Cal. Apr. 1, 2015) (plaintiffs alleged that defendant "deliberately" shared data in violation of its privacy policy); *In re Adobe Sys., Inc. Privacy Litig.*, 66 F. Supp. 3d 1197, 1231–32 (N.D. Cal. 2014) (plaintiffs identified "a number of specific industry-standard security measures that [defendant] did not implement" even as "competitors did"); *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, 2017 WL 3727318, at *24 (N.D. Cal. Aug. 30, 2017) (plaintiffs alleged that defendants had "violated [their] own privacy policy"). As set forth above, Plaintiffs here allege nothing of the sort.[4]

IV. Mere Recipients Have No Standing

Plaintiffs' opposition also does not offer a persuasive argument that the Recipient Plaintiffs have standing. Because Recipients never bought the product, they cannot "show that [they] actually relied on the alleged omission," as they must

[4] Even had it contained a plausible allegation of an unfair practice, the Complaint does not provide allegations adequate to permit the Court to "weigh the utility of the defendant's conduct against the gravity of the harm," or apply any of the other standards used by courts evaluating the sufficiency of UCL "unfair practices" claims. *See Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1169–70 (9th Cir. 2012) (cleaned up).

in order to establish standing. *Joseph v. Costco Wholesale Corp.*, 2016 WL 759559, at *3 (C.D. Cal. Feb. 24, 2016), *aff'd* 691 F. App'x 865 (9th Cir. 2017). At most, by Plaintiffs' telling, disclosure of the allegedly-omitted information about InComm's security might have deterred Recipients' loved ones from purchasing the cards and giving them to Recipients as gifts.

Plaintiffs offer no meaningful rejoinder to this point, or to decisions rejecting gift recipients' claim to UCL standing. *See* Mot. at 21. And the decisions they cite, Opp'n at 24, do not help them. The *Marilao* court ***dismissed*** UCL claims for failure to state a claim and for lack of standing. *Marilao v. McDonald's Corp.*, 632 F. Supp. 2d 1008, 1012–13 (S.D. Cal. 2009). Meanwhile, the plaintiffs in *McVicar*—unlike the Recipients here—"*paid for*, and were stuck with," the defective product. *McVicar v. Goodman Glob., Inc.*, 1 F. Supp. 3d 1044, 1051 (C.D. Cal. 2014) (emphasis added). Recipients here never paid for the cards.

If Plaintiffs had their way, the UCL would be a vehicle for any person to bring suit over any grievance about any product, no matter how it came into their possession and regardless of whether they lost any money as a result. And any defendant would be subject to liability (at least) twice—once to the purchaser and once to anybody who subsequently received the product as a gift. As cases cited both by InComm and by Plaintiffs show, that is not the law.

V. Plaintiffs' Common-Law Claims Also Fail

Plaintiffs do not meaningfully dispute that their unjust enrichment claim is barred by the existence of a contract governing their relationship with InComm. *See* Mot. at 23 n.4. Indeed, they concede that InComm had a "contractual agreement with purchasers" in the form of the cardholder agreements. Opp'n at 22. Separately, the unjust enrichment claim must also be dismissed because it is based on the same deficient allegations discussed above (and, even Plaintiffs agree, is subject to Rule 9(b)'s particularity requirement).

Plaintiffs' claim for breach of implied contract is also barred by the written contracts. Mot. at 24 n.5. Plaintiffs respond that InComm has not shown that the cardholder agreements "embrace the exact same subject" as the purported implied contract. *See* Opp'n at 22–23. But that is only because the Complaint is so utterly lacking in detail that InComm cannot determine which cardholder agreements apply. *See* Mot. at 8 n.3. As in the Rule 9(b) context, Plaintiffs cannot rely on the deficiencies in their Complaint to excuse the deficiencies in their Complaint.

Plaintiffs' argument also misstates the law, which precludes implied-contract claims relating to issues that "fall[] within the same umbrella" as a written contract, whether or not the latter covers "every possible scenario" involving those issues. *Allied Trend Int'l, Ltd. v. Parcel Pending, Inc.*, 2019 WL 4137605, at *3–4 (C.D. Cal. June 3, 2019) (finding that written contract defeated implied contract claim). Finally, Plaintiffs' implied-contract claim fails for the other reasons set forth in InComm's motion to dismiss, *see* Mot. at 22–23, including Plaintiffs' failure to allege facts suggesting that InComm had "substandard" security features.

CONCLUSION

Plaintiffs could have amended their Complaint in response to InComm's motion, but chose not to do so. They also provide no reason to think that amendment would be anything other than futile. The Court should therefore deny Plaintiffs' request for leave to amend and dismiss the Complaint with prejudice.

Respectfully submitted,

Dated: February 20, 2023

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for InComm Financial Services, Inc., certifies that this brief is twelve pages, which complies with the page limit set by court order dated October 20, 2022.

Dated: February 20, 2023

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